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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 317

MYRTLE FRANCES BROCKI,
Petitioner,
vs.
AMERICAN EXPRESS COMPANY,
a New York Joint Stock Association,
and
DEMERY'S, INC., a New Jersey corporation,
Respondents

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

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INAPPLICABILITY OF CHAPMAN v. BARNEY, 129 U. S. 677

(Figures in parentheses refer to pages of Appellant's Appendix unless context clearly indicates otherwise)

Respondents rely upon *Chapman v. Barney*, 129 U. S. 677, in support of their claim that a New York Joint Stock Association has no citizenship for purposes of diversity jurisdiction. Petitioner submits that this case does not control the case at bar. *Chapman v. Barney, supra*, was decided on the insufficiency of the allegation in plaintiff's pleading to make the rule of corporate citizenship appli-

cable. The Court stated there was "no satisfactory showing as to the citizenship of the Plaintiff". The Court specifically stated at page 682:

> "On looking into the record, we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is that the United States Express Company is a joint stock company organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is *not* a corporation, but a joint stock company,—that is, *a mere partnership.* And, although it may be authorized by the laws of the state of New York to bri... suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court." (Emphasis added.)

Chapman v. Barney, supra, only decided that the bare allegation that a company is a joint stock association is "not an allegation that it is a corporation" but is " a mere partnership". It was decided in the atmosphere of 1889 when pleadings were strictly construed against the pleader and the omission of a word was fatal. Today a different rule would apply: "All pleadings shall be so construed as to do substantial justice." [Federal Rules of Civil Procedure, Rule 8(f).] In the case at bar, Petitioner has affirmatively alleged that Respondent, American Express Company, is a New York corporation (2a), and she has established that New York law makes it a juridical person. In her petition for writ of certiorari, Petitioner has cited the applicable New York law which invests a New York joint stock association with all corporate characteristics and

powers. *Respondent does not deny that it has all such characteristics and powers.* These include perpetuation of the organization upon the death of a stockholder or any other transfer of his shares; it has articles of association filed with New York authorities in the same manner as corporations; its articles of association must "prescribe the number of its directors, * * * to have the sole management of its affairs"; it admits it has over 22,000 stockholders (11a).

This organization is a far cry from the association inadequately pleaded in *Chapman v. Barney*, 129 U. S. 677, decided in 1889. This Court there observed that the joint stock association was only "authorized by the laws of the state of New York to bring suit in the name of its president". There was no showing that New York law then created the association as a legal entity separate and distinct from its stockholders. Here the petition for writ of certiorari shows that a New York joint stock association now has the *constitutional right* to be sued in its own name as a natural person (Article X, Section 4, Constitution of New York) and thus New York has created a legal entity apart from group who own it.

The Court, in 1889, in deciding *Chapman v. Barney, supra*, indicated that at that time a pleader's allegation that a party is a joint stock association alleges only "a mere partnership". A review of the Constitution and Statutes of New York shows that under present legal concepts, a New York joint stock association is an entity separate and distinct from its stockholders and is not a mere partnership. Respondent is not justified in making the unsupported statement that it is an "unincorporated association". The present New York law requiring the filing of written articles of association with public authori-

ties, annual reports, privilege fees, etc. plus statutory requirements of corporate government, such as a board of directors not less than three, to have the "sole management" of its business, indicates corporate organization.

Respondent should not be permitted to evade federal jurisdiction by calling itself "a joint stock association" without indicating in what manner its *organization* differs from conventional concepts of a corporation. A joint stock association has now been given all corporate powers and privileges so that in this day and age an allegation that a company is a "New York joint stock association" does not even suggest that it is a "mere partnership" as in 1889 when *Chapman v. Barney* was decided. It is now the equivalent of an allegation of New York incorporation. The Michigan Supreme Court at an early stage in its history recognized this evolutionary process in *Lyon v. Denison*, 80 Mich. 371, when it said (p. 380):

> "There is an essential difference between a joint-stock company as it existed at the common law, and a joint-stock company having extensive statutory powers, conferred upon it by the state within which it is organized."

Petitioner has pointed out that Congress has recognized this development when it defined the term "person" to include a joint stock association, (1 U. S. C. A. par. 1); that the State of New York recognized the development when it defined the term "person" to include a New York joint stock association (General Construction Law of New York, Article 2, par. 37).

The bare plea of "joint stock association" no longer indicates conclusively that the organization is not a juridical person. Petitioner contends that the statutory characteristics of a New York joint stock association now equal the

traditional concepts of a corporation; that the present New York joint stock association is a "juridical person" separate and distinct from its 22,000 stockholders who have no personal interest in any controversy between Petitioner and the organization in which they are mere investors. The difference today is a matter of label only! Federal jurisdiction should not be lost because of the name by which an entity is known.

CONFLICT BETWEEN THIRD AND SIXTH CIRCUITS

Respondent seeks to distinguish *Van Sant v. American Express Company*, 169 Fed. (2d) 355, by stating that the Court "failed to make the necessary distinction between suability as an entity and citizenship for purpose of federal diversity jurisdiction" (Respodndent's brief, p. 12). Respondent seeks to divert this Court's attention from the basic proposition that the Court in *Van Sant v. American Express Company, supra*, could only acquire jurisdiction on a diversity basis. The Court in commencing its discussion stated that "since this is a diversity of citizenship case," that it would be obligated to follow the law of the state wherein the Court sits. The question of diversity jurisdiction was then discussed. Naturally, the question of suability had to be answered first. The Court hearing *Van Sant v. American Express Company* was sitting in Pennsylvania. Plaintiff in that case was a citizen of Pennsylvania and the American Express Company was alleged to be a citizen of New York. The only possible basis for jurisdiction was diversity of citizenship. There can be no doubt that the decision in *Van Sant v. American Express Company* is in complete conflict with the decision of the Court of Appeals for the Sixth Circuit in the instant case.

Respondent, and the lower Court, relied upon *Swan v. First Church of Christ, Scientist, in Boston*, 225 Fed. (2d) 745 (Ninth Circuit, 1955) (15a) to support the proposition that a joint stock company does not have citizenship for diversity purposes. An analysis of the opinion in that case will show that it supports the position of Petitioner rather than the position of Respondent. *Swan v. First Church of Christ, Scientist, supra,* arose in a District Court in California, and involved a controversy between the Plaintiff and Defendant Church which Plaintiff alleged was a Massachusetts corporation. The Defendants claimed that they were trustees for the church and had possession of and maintained church property, but that such trusteeship did not constitute corporate existence; that the trustees had very limited powers under the law of Massachusetts. The Court examined Massachusetts law and concluded that the trustees and officers of the church constituted a corporation under Massachusetts law, and that diversity of citizenship existed. The Court there said (p. 747):

> "Jurisdiction here may be found only if it can be said that a defendant can be held to be a corporation of a state other than that of plaintiff's residence. It is not enough to say that these organizations might be sued by their common names, without naming the individual members. * * * Jurisdiction here depends upon the concept of 'citizens of different States' in Article III of the Constitution and in Sec. 1332 of Title 28."

(p. 748):

> "They are 'deemed' bodies corporate, for they automatically become such whenever they fit the statute, and without other formality. It is true that such corporations have powers which are very limited. Corporations vary greatly in the extent of their powers and the breadth of their purposes. But

> the concept of citizenship for diversity jurisdiction, as applied to corporation, has never been dependent upon the scope of their powers. * * *
>
> We hold that the Church and the Directors named were a corporation and subject to suit in the court below."

(p. 749, footnote 6):

> "While the view we take of the corporate character of the Church and the Directors means that we agree that the requisite diversity of citizenship existed, * * *."

It is Petitioner's claim that American Express Company "fits the statute" of the State of New York, and that it is a corporation.

It is interesting to note that in *Swan v. First Church of Christ, Scientist, supra,* the Court was influenced by the fact that the trustees qualified as a foreign corporation in California (footnote 5, p. 749):

> "The trial court found that the Church and the Board of Directors had previously qualified as corporations in the State of California and made the necessary filing with the Secretary of State for that purpose * * *."

In the case at bar the American Express Company has qualified to transact business in Michigan as a New York corporation, and it should be held to this position.

Respondent has not placed before this Court its articles of association, by-laws, stockholders rights and powers, or any other information to enable this Court to evaluate it to determine as a matter of law whether or not it is a corporation. Throughout all argument it has been content to rely upon the bare label that it is a New York joint stock

association. Petitioner maintains that examination of the New York Constitution and statutes shows that Respondent is a "juridical person" separate and distinct from its stockholders, and, in the absence of a showing to the contrary, it should be treated as a corporation for federal diversity jurisdiction.

RELIEF

Petitioner submits that there is an irreconcilable conflict between the decisions of the Third Court of Appeals and the Sixth Court of Appeals; that it is a matter of importance to Petitioner and the public to know whether or not the American Express Company can be sued in a Federal Court on a diversity basis, and that this Court should grant the Petition for certiorari to resolve the conflict.

Respectfully submitted,

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